In forma pauperis
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IN THE

Supreme Court of the United States

October Term, 1941

No. 239

STEFFEN OSLAND, *Petitioner*

v.

STAR FISH & OYSTER COMPANY,
a Corporation,
Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

PALMER PILLANS
ALEXIS T. GRESHAM
for Respondent

Chas. C. Hand
Pillans, Cowley & Gresham
of Counsel

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Opinion Below

As the case was tried to a jury, there was no opinion in the District Court. The opinion of the Circuit Court of Appeals for the Fifth Circuit, is reported in 118 Fed. (2d), 772.

Supplemental "summary and short statement of the matter involved" (Sup. Court R. 38, paragraph 2)

Osland's action was a personal-injury suit brought under Section 33 of the Merchant Marine Act of 1920 (Sec. 688 of Tit. 46, U.S.C.A.). Concededly he was not entitled to recover unless there existed, between him and the defendant, the relation of employee and employer. It was around the existence *vel non* of such relationship that the trial revolved. The learned trial judge charged the jury exhaustively on the *criteria* for determining whether or not the master-and-servant relationship existed between defendant and plaintiff. The plaintiff asked no written charges (instructions) to the jury; nor did he except to any of the written charges given at the request of defendant. The jury resolved the question in defendant's favor. Plaintiff moved for a new trial. the motion was denied. Plaintiff appealed to the Circuit Court of Appeals, which affirmed the judgment below. Now he wants one more go at it.

Argument

The case involves no question calling for the exercise of the revisory power of this Court.

In *Magnum Import Co. v. Coty,* 262 U.S. 159, 163, this Court said that the certiorari jurisdiction

> "was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that 80 per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

It is submitted that the *instant* petition is plainly within that 80 per cent. As the Court said in *Re Woods,* 143 U. S. 202, 205-206, the purpose of the establishment of the Circuit Court of Appeals, was to relieve this Court of the

> "oppressive burden of general litigation, which impeded the examination and disposition of cases of public concern."

How that purpose is attempted to be thwarted by litigants striving for still another try, appears from references in utterances of this Court. At the 1915 term, 154 petitions (for certiorari) were presented (*Furness, Withy vs. Ins. Assn.* 242 U. S. 430). At the 1922 term, 420 petitions were submitted (*So. Power Co. vs. Pub. Service Corp.*, 263 U. S. 508, 509).

It is a little difficult to determine just what petitioner pitches his case on.

In his jurisdictional statement under R. 12, petitioner relies on (1) the Merchant Marine Act of 1920 (the "Jones Act"); and (2) the alien-charterer notion under Sec. 808 of Tit. 46, U.S.C.A.

In the petition itself, the thoughts tabulated as to be urged in support of the petition, are set out at pp. 5 and 6. The first two challenge what petitioner styles "findings" of the Court of Appeals; and the other two challenge the legal conclusion of the Court, that the citizenship of George Brown (plaintiff's "alien charterer") could have no bearing on the issue of Osland's employment *vel non* by the Star Fish & Oyster Company.

Then on pp. 6-10 (of the petition) it is suggested that there is conflict between the Circuit Courts of Appeals, that calls for clarification by this Court.

Finally, on p. 10, it is suggested that there has been decided an "important question of Federal law" in this case, which this Court has not settled and should settle.

Let's get rid first of the two items that challenge the charged "findings" of fact by the Circuit Court of Appeals.

In the first place, with respect, there were no such "findings". The action was a common law suit tried to a jury. The "findings" on the master-and-servant issue were left to, and were made by, that jury. The apeal was on the record and, of course, there was no trial *de novo* above but a decision on whether or not there was error in

the rulings below. All the assignments of error went either to evidence questions not before this Court, or to the "alien-charterer" notion. There was the same effort to argue the facts on that appeal as now (see petition pp. 11-16, Brief 19-20.) It failed there, as *a fortiori* it must fail here, we submit. It is settled in this Court that *certiorari* will not lie to review evidence, or inferences therefrom, and discuss specific facts. (*United States vs. Johnston,* 268 U. S. 220, 227; *General Pictures Co. v. Electric Co.,* 304 U. S., 175, 178.)

It is thought, with respect, that the supposed conflict between circuit courts of appeal, is imaginary. Certainly, it is submitted, there is no conflict of the type that stirs the action of this Court. To justify *certiorari,* the conflict must be

> "a real and embarassing conflict of opinion and authority" on a question "not controlled by State law."
>
> Layne Corp. v. Well Works, 261 U. S., 387, 393. Ruhlin v. Ins. Co. 304 U. S. 202, 206

In the *Layne* case just cited, the Court said

> " . . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of *importance to the public as distinguished from that of the parties . . .* " (our emphasis)
>
> Layne etc. v. Well Works, 261 U. S. 387, 393

Nor is there an "important question of Federal Law" involved. The issue debated was whether or not, within the doctrines of the law of master and servant, Osland was the servant of the Star Fish & Oyster Company. What is the law of master-and-servant, is not a Federal question. It is a part of the great general body of jurisprudence. It was so treated in the trial court and in the Circuit Court of Appeals. There is no valid excuse, it is thought with respect, for seeking to intrude its consideration again on this Court.

But Petitioner seeks to import a Federal question into the case by invoking the Federal statute forbidding the chartering of American vessels to aliens. It seems, with respect, a little absurd to think this statute applicable to a fishing lay. But, for argument, assume it applicable. The step, in logic, from that premise to petitioner's conclusion, is not possible. Let's put it thus: To recover, Osland must establish that he was Star Fish & Oyster Company's servant. There's no dispute over who hired him. George Brown hired him. George Brown is the sole link between Osland and the Star Fish & Oyster Company. If Brown was the servant of Star Fish, and validly hired Osland for Star Fish, then Osland was a servant of Star Fish and entitled to recover (if he should prove actionable negligence). But if George Brown procured Osland and the rest of the ship's company (they were all procured alike and occupied each the same status as the others) to engage with him in a joint adventure of catching fish; victualling, fuelling, icing and using the Star Fish Company's boat and selling the catch to that Company; then there was *no* relation of master and servant between Star Fish and Osland and he must fail in his action. There was evidence to support each of these opposing theories. The determination of the fact was left to the jury. The jury found the second to be the true status, and so found for the defendant. Petitioner must deraign title to recovery, through George Brown. If George Brown's undertaking with the Star Fish & Oyster Company was as the jury found it, plaintiff can take nothing. This must be true equally whether George Brown be a citizen or alien. If the status of employment of Osland by the Star Fish, would not have existed by reason of Osland's arrangement with George Brown had Brown been a citizen; then it could not spring into being because Brown was an alien. There is no relationship of master and servant *in invitum*. The Star Fish & Oyster Company is not seeking to base a right on a violation of law—it simply did not hire Osland, as the jury found, and can not be held liable, as though it did hire him, because Brown was an alien.

We conclude this brief treatment by drawing attention to the misapprehension with which our learned and charming opponent is seeking to bolster her "alien charterer" notion.

Repeatedly throughout the petition and supporting brief one reads that respondent's "sole defense" was a reliance on "an illegal and void charter of the boat to the alien," and that this was a mere "subterfuge" to beat Osland.

The defense was in fact a denial of the existence of the relation of master and servant between Star Fish & Oyster Company and Osland. There were seven pleas. Some of them set out at large the fishing-lay arrangement and dubbed it a "charter"—whether accurately or not is unimportant, as the facts pleaded speak for themselves. Other pleas contented themselves with asserting that the relation of master and servant did not exist, and that hence plaintiff could not recover. Of the seven pleas, four were negations of the employee status of plaintiff, alleged in his complaint and necessary of proof to enable recovery. Of these four, two were the general issue (denial of the material allegations of the compliant) and the other two, which are very brief, are set out below:

III

> "The plaintiff should not have and recover of the defendant, for that the relation of master and servant did not exist between the plaintiff and the defendant.

IV

> The plaintiff should not have and recover of the defendant, for that the defendant did not employ the plaintiff."

Perhaps the petitioner's whole effort is well typified by the "sole-defense" and corporate-villain-oppressing-injured-innocence-with-vile-subterfuge *motif* that runs like a theme song through the brief, and by petitioner's

charge that the learned Circuit Court of Appeals "ruthlessly" (petition, p. 11) overrode appellant's contentions and affirmed the judgment on the jury's verdict below. It may be remarked, by the way, that American juries have *not* been notable for "ruthlessly" finding verdicts against badly hurt plaintiffs in actions against "large and powerful corporations." (Sic, petition, p. 11).

It is submitted that no grounds for *certiorari* are presented; that the decision below was plainly right; and that the petition for certiorari should be denied.

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I certify that on this day a copy of the above and foregoing brief was served on counsel for petitioner.

August ....., 1941.

.....
Attorney for Respondent